NO. 87-1606

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

J. O. DAVIS, Warden,

PETITIONER,

VS.

REGINALD JONES,

RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT
OF APPEALS, ELEVENTH CIRCUIT

OF

DON SIEGELMAN
ATTORNEY GENERAL OF ALABAMA

MARTHA GAIL INGRAM
ASSISTANT ATTORNEY GENERAL OF ALABAMA

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ATTORNEYS FOR PETITIONER

QUESTION PRESENTED

Did the United States Court of Appeals, Eleventh Circuit, misconstrue the burden placed on a defendant under Swain v. Alabama to prove a prima facie case of discrimination and issue a ruling contrary to the explicit language of Swain?

PARTIES

The caption contains the names of all parties to the proceedings in the courts below.

TABLE OF CONTENTS

TABLE OF CASES

OPINIONS BELOW

1. The opinion of the Eleventh Circuit Court of Appeals, reversing and remanding the District Court's denial of Respondent's petition for writ of habeas corpus, is reported at 835 F.2d 835 (11th Cir. 1988) and is reproduced as Appendix A.[1]

2. The Order of the United States District Court for the Southern District of Alabama denying Respondent's certificate of probable cause is not reported but is reproduced as Appendix B.

3. The Order of the United States District Court for the Southern District of Alabama denying Respondent's habeas corpus petition is not reported but is reproduced as Appendix C.

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[1]The appendix to this petition is separately bound pursuant to Rule 21.1(k).

4. The Recommendation of the Magistrate denying Respondent's habeas corpus petition which was adopted as the opinion of the United States District Court for the Southern District of Alabama is not reported but is reproduced as Appendix D.

JURISDICTION

The judgment of the United States Court of Appeals, Eleventh Circuit, which is sought to be reviewed, was rendered on January 15, 1988. See Appendix A. Petitioner's timely Suggestion for Rehearing En Banc was denied on March 1, 1988. This petition is filed within sixty days of that denial, as permitted by Rule 20.4.

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment to the United States Constitution:

> "...No state shall ... deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

THE FACTS

At the hearing in state court on Respondent's motion for a new trial, Lee Stamp, a Mobile attorney who had practiced there for two and one-half years, testified that in his observation the District Attorney uses its peremptory challenges to strike the members of the black race, Asians, and Hispanics. (R-103-105).[2] Stamp recalled the names of two cases in which this had occurred. (R-105). He made mistrial motions when this occurred. Stamp had observed over twenty jury cases over that time period. (R. 106). Stamp was asked:

> Q: Can you state unequivocably and under

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[2]The facts recited are generally taken from the opinions in the courts below, some of which are unpublished and reproduced in the Appendix. References to pages in the transcript be be begun by "R".

oath in every single one of those cases the State used every one of its peremptory strikes against black jurors or veniremen?

A: I couldn't do that.

Q: Are you aware of any systematic policy or practice of the District Attorney's office other than your own observations that there is a policy in the District Attorney's office to strike all members of the black race?

A: No. (R-106-107).

Roosevelt Simmons, a Mobile attorney with two and one-half years experience, testified he had tried an estimated twenty-five criminal cases. (R-107-108). He stated that he had objected five or six times to the use of peremptory challenges to strike blacks. (R-108). Mr. Simmons testified:

Q. Can you state under oath that in every single case you've observed the District Attorney's

office has used every peremptory strike available to strike off that venire every black jury venireman it could?

A. No, I can't unequivocably make that statement. (R-110-111).

Later, Simmons testified:

Q. Are you aware of any -- Do you have any actual knowledge of any systematic practice of policy of the District Attorney's office, any articulated policy to strike black veniremen from every jury?

A. I don't have. (R-111).

Jeff Deen, a Mobile attorney with six years experience, testified that at trials in general eighty percent of the District Attorney's strikes are members of the black race. (R-112-113).

Major Madison, Jr., a Mobile attorney for two and one-half years, had tried four or five criminal cases in the last two years. (R-118-119). Madison testified that in the case of Curtis

Allen, a black male, the District Attorney left a black on the jury when it had enough strikes to remove him from the jury. (R-121).

Steve Orso, a Mobile attorney for two and one-half years, testified that he had tried between thirty and forty-five cases during that time. (R-122). In one or two trials there were some blacks on the jury. (R-123). In the last three out of four cases he tried, there has been one black left on the jury. (R-123).

Robert Clark, who had been a Mobile attorney for fourteen years, had defended criminals almost exclusively for the last four years. (R-125). Clark recalled five cases in which all blacks had been struck from the venire by the prosecution. (R-127).

Robert McGregor, the assistant district attorney in Petitioner's case, testified that he has tried twelve jury cases and he had not used his strikes to strike all blacks off the jury except in three cases. (R-130-131).

PROCEEDINGS BELOW

Respondent was indicted for the offense of burglary in the third degree, a violation of Section 13A-7-7, Code of Alabama 1975. (CR-1). After the jury was chosen, Respondent made a motion for a mistrial alleging that the State had used its strikes to strike all the blacks off the jury, which was then denied. (R-4). Respondent was ground guilty and sentenced to life under Alabama's Habitual Felony Offender Act. (CR-21). He raised these same grounds again in his motion for a new trial. (CR-24-25). Following a hearing, that motion was also denied. (CR-26, R-101-133). Respondent's conviction was affirmed without opinion on June 17, 1984, by the Alabama Court of Criminal Appeals. Rehearing was denied without opinion in this case on August 14, 1984, and certiorari was denied without

opinion on October 19, 1984, by the Alabama Supreme Court.

On June 21, 1985, the Respondent filed in the United States District Court for the Southern District of Alabama, a petition for writ of habeas corpus, CV 85-0830-X. In that petition he challenged the state's striking of blacks from the jury in his case. On January 17, 1986, the Magistrate recommended denial of the petition. (Appendix D). Thereafter, on February 13, 1986, United States District Judge W. B. Hand issued an order denying Respondent's habeas corpus petition. (Appendix C). On February 16, 1986, the Respondent's notice of appeal, application for certificate of probable cause and motion to proceed in forma pauperis were filed with the Clerk for the Southern District. The certificate and the pauper motion were denied on

March 6, 1987, in a written opinion by Judge Hand. (Appendix B). On May 28, 1986, the certificate of probable cause and motion to proceed in forma pauperis were granted by United States Circuit Judge James Hill. Respondent's motion for appointment of counsel was denied on August 4, 1986. Subsequent to the filing of briefs in this case, counsel was appointed for Respondent and leave was given for the filing of Supplemental Briefs. Oral argument was heard in this case on April 21, 1987. On January 15, 1988, a panel of the Eleventh Circuit Court of Appeals entered an opinion reversing and remanding this case for an evidentiary hearing based on their finding that Respondent had met his initial burden under Swain v. Alabama, 380 U.S. 202, 85 S.Ct. 824, 13 L.Ed.2d 759 (1965). (Jones v. Davis, 835 F.2d 835 (11th Cir. 1988). (Appendix A). A

timely Suggestion for Rehearing En Banc was filed by Petitioner and denied on March 1, 1988, without opinion.

REASONS FOR GRANTING THE WRIT

The Decision Below Misconstrues the Burden Placed on a Defendant under Swain v. Alabama to Prove a Prima Facie Case of Discrimination is Contrary to the Explicit Language of Swain.

In Swain v. Alabama, 380 U.S. 202, 85 S.Ct. 824, 13 L.Ed.2d 759 (1965), this Court, when addressing a claim of systematic exclusion through the use of peremptory strikes, held as follows:

> But when the prosecutor in a county, in case after case, whatever the circumstances, whatever the crime and whoever the defendant or the victim may be, is responsible for the removal of Negroes who have been selected as qualified jurors by the jury commissioners and who have survived challenges for cause, with the result that no Negroes ever serve on petit juries, the Fourteenth Amendment claim takes on added significance.

380 U.S. at 223 (emphasis added). This Court went on to state:

> [I]f the State has not seen fit to leave a single Negro on any jury in a criminal case, the presumption protecting the prosecutor may well be overcome.

380 U.S. at 224 (emphasis added).

The opinion of the Eleventh Circuit in the present case found, based on testimony that showed clearly that blacks had been left on juries in criminal cases tried by members of the Mobile County District Attorney's Office and by this particular assistant district attorney, that the Respondent had met his initial burden. Jones v. Davis, 835 F.2d 835 (11th Cir. 1988). That opinion states:

> At his evidentiary hearing, petitioner must prove on specific facts that [the prosecutor] had a systematic and intentional practice of excluding blacks from traverse juries in criminal trials through the exercise of peremptory challenges and that this practice continued unabated in petitioner's trial. The exclusion must have occurred

> 'in case after case, whatever the circumstances, whatever the crime and whoever the defendant may be.' Swain, 380 U.S. at 223 [85 S.Ct. at 837]. Petitioner is not required to show that the prosecutor always struck every black venireman offered to him, [United States v. Pearson, 448 F.2d 1207, 1217 (5th Cir. 1981)], but the facts must manifestly show an intent on the part of the prosecutor to disenfranchise blacks traverse juries in criminal trials in his circuit, "to deny the Negro the same right and opportunity to participate in the administration of justice enjoyed by the white population." Swain, 380 U.S. at 224 [85 S.Ct. at 838].

835 F.2d at 838.

The Eleventh Circuit's decision is contrary to Swain. In so asserting Petitioner relies, in the alternative, on two different interpretations of the burden Swain places on a defendant. To reiterate, in Swain this Court stated

> But when the prosecutor in a county, in case after case, whatever the circumstances,

> whatever the crime and whoever the defendant or the victim may be, is responsible for the removal of Negroes who have been selected as qualified jurors by the jury commissioners and who have survived challenges for cause, with the result that no Negroes even serve on petit juries, the Fourteenth Amendment claims takes an added significance.

380 U.S. at 223. The obvious and most reasonable interpretation of this sweeping language is that in order to prove a prima facie case of discrimination under Swain, a defendant must show the State's striking practice in all or almost all of the criminal cases tried in a county over a substantial period of time, and not just a small sample of the cases as was done here. This is certainly consistent with the statement by this Court in Swain that

> If the State has not seen fit to leave a single Negro on any jury in a criminal case, the presumption [of

> nondiscrimination]
> protecting the prosecutor
> may well be overcome.

380 U.S. at 224 (emphasis added).

The second, and alternative, interpretation of Swain urged by Petitioner is that if Swain does not require proof of the State's practice in all of the cases tried over a period of time, it requires at a minimum that a defendant show the State's actions in a significant portion of those cases and, just as important, that in all of the cases considered the State used its strikes to eliminate all blacks from the jury. Such a showing is mandated by Swain. Under Swain the State's exclusion of blacks must be so total that the only reasonable conclusion is of an intent to preclude blacks from ever serving on juries. 380 U.S. at 224. In order to prove this, the defendant must establish the State's

practice in a large proportion of its cases. In addition, Swain must be read as requiring a showing that all blacks were eliminated by the State in all the cases considered, because proof that the State left blacks on juries when it could have struck them disproves an intent to discriminate.

The burden described in the Petitioner's second argument was also not met here. Respondent presented the testimony of six attorneys, out of an unknown number which practice in the Mobile County Circuit Court. These attorneys testified as to the specific striking results in only relatively few cases, and it cannot be established from this record what percentage of all those tried this small number represents. Moreover, the testimony of the six attorneys called by Respondent affirmatively showed that blacks were

left on juries in at least some of the cases discussed. Respondent has thus failed to meet the requirements of this second interpretation of Swain.

The difference in the Eleventh Circuit's interpretation of Swain and that of the Eighth Circuit is demonstrated by United States v. Carter, 528 F.2d 844 (8th Cir. 1975), cert. denied, 425 U.S. 961 (1976). In Carter the Eighth Circuit rejected a Swain challenge which was based on the results in fifteen cases. That Court cited two reasons. First, the Eighth Circuit held that this number (actually thirteen, subtracting two involving the defendant in Carter) represented too small a sample from which to conclude that the strikes were based on race and not on reasons arising from the individual cases. 528 F.2d at 850. Second, the Eighth Circuit pointed out that in a

number of the cases cited, blacks had been left on the jury despite the availability of sufficient peremptory strikes to exclude them. Id, at 849-850.

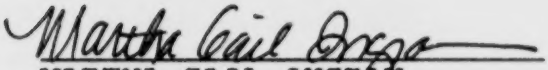
In Swain this Court placed on defendant a very heavy burden to show intentional discrimination. The Eleventh Circuit's decision in this case improperly replaces this burden with a much lighter one, which can be satisfied with testimony from only a few attorneys regarding a smattering of cases.

CONCLUSION

Because the Eleventh Circuit has misconstrued the burden on defendants under Swain v. Alabama thereby imposing a much lighter burden, the Court should certiorari in this case and reverse the decision of the Eleventh Circuit Court of Appeals.

Respectfully submitted,

DON SIEGELMAN
ATTORNEY GENERAL
OF ALABAMA
BY-



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CERTIFICATE OF SERVICE

I, Martha Gail Ingram, a member of the Bar of the Supreme Court of the United States, do hereby certify that this 25th day of March, 1988, I did serve a copy of this petition and a copy of the accompanying appendix on Respondent by placing the same in the United States Mail, first class postage prepaid, and properly addressed to counsel of record for Respondent as follows:

Honorable George Huddleston
Honorable Lynn E. Quinley
Huddleston, Powell And Quinley
P. O. Box 967
Daphne, Alabama 36526

I further certify I have served all parties required to be served.

Martha Gail Ingram

MARTHA GAIL INGRAM
ASSISTANT ATTORNEY GENERAL
OF ALABAMA

87-1606

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OCTOBER TERM, 1987

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TABLE OF CONTENTS

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

NO. 86-7145

REGINALD JONES,

Petitioner-Appellant,

versus

J. O. DAVIS, Warden,

Respondent-Appellee.

Appeal from the United States District Court for the Southern District of Alabama

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(January 15, 1988)

Before TJOFLAT and ANDERSON, Circuit Judges, and HENDERSON, Senior Circuit Judge.

PER CURIAM:

Reginald Jones appeals the denial of his petition for a writ of habeas corpus by the United States District Court for the Southern District of Alabama. For the reasons stated below, we reverse.

In September 1983, Jones, a black male, was indicted by a grand jury in Mobile County, Alabama for burglary in the third degree. During the selection of a jury for the trial of the case, the Assistant District Attorney of Mobile County, Alabama used seven of his nine peremptory strikes to excuse all blacks from the jury venire. Objecting to this tactic, Jones moved for a mistrial. The motion was denied, but the trial court granted Jones leave to proceed, at a subsequent evidentiary hearing, on this point. Jones was tried and convicted by an all-white jury. He was sentenced to

life imprisonment in accordance with Alabama's habitual offender statute.[1]

Following the imposition of sentence, Jones filed a motion for a new trial alleging in part that the state's purposeful, deliberate and systematic use of its peremptory challenges to strike all blacks from his venire violated his constitutional rights. An evidentiary hearing was held during which seven local criminal defense attorneys testified in support of the motion. Each expressed a belief that it was the practice of the district attorney's office to exclude blacks from the jury service. The Assistant District Attorney who prosecuted the case also testified, denying the existence of any such pattern or policy

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[1]Footnote 1 and all other footnotes for this opinion are reproduced seriatim at the end of this opinion. See pp. 20a - 23a, infra.

of exclusion and justifying the use of his peremptory strikes in Jones' case by stating that "I didn't like the looks of those seven people and that's why I struck them." The trial court denied the motion for a new trial.

Jones appealed his conviction to the Alabama Court of Criminal Appeals, alleging as one ground for reversal that the trial court erred in denying the motion for a new trial based on the state's use of its peremptory challenges. The conviction was affirmed without opinion, rehearing was denied and on October 19, 1984, the Supreme Court of Alabama denied Jones' petition for a writ of certiorari.

Having exhausted his state remedies, Jones then filed the present petition for habeas corpus in the United States District Court for the Southern District of Alabama, pursuant to 28

U.S.C. §2254 (1976), alleging that his "conviction violated the constitution or laws of the United States ... [because] [m]embers of the black minority were excluded by means of the prosecuting attorney using seven of the prospective black jurors." (Habeas Corpus Complaint, filed June 12, 1985, paragraph 10(a)(1)). Adopting the recommendation of the magistrate, the district court denied Jones' petition. This appeal followed.[2]

In denying Jones' petition for habeas corpus relief, the district court relied exclusively on the Supreme Court's opinion in Swain v. Alabama, 380 U.S. 202, 85 S.Ct. 824, 13 L.Ed.2d 759 (1965). Swain was a black defendant convicted by an all-white jury of the rape of a white female. Relying on the Fourteenth Amendment's Equal Protection Clause, Swain challenged the

prosecutor's use of peremptory strikes to exclude all black people from the petit jury. The Supreme Court refused to allow a challenge to the exclusion of blacks from a jury in any particular case, and stated that equal protection concerns would only be implicated if a pattern of systematic exclusion could be established.

Although widely criticized,[3] Swain remained the final word on peremptory challenges until the Supreme Court's recent decision in Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986). In Batson, the Supreme Court held that a defendant could establish a prima facie case of an equal protection violation solely on the basis of proof regarding the prosecutor's action in his/her trial. According to the Court, a prima facie case is established if the defendant

proves (1) that she/he is a member of a cognizable racial group; (2) that the prosecutor used peremptory strikes to remove members of the defendant's race from the venire; and (3) that an inference may be found that the venirepersons were removed because of race.

[1] The Supreme Court rendered its decision in Batson on April 20, 1986, approximately two months after the district court denied Jones' petition for habeas corpus relief and a little more than a year after the expiration of the time for filing a petition for a writ of certiorari to the United States Supreme Court.[4] On appeal, Jones seeks a retroactive application of Batson. This remedy, however, is clearly barred by the Supreme Court's subsequent opinion in Allen v. Hardy, 478 U.S. ___, 106 S.Ct. 2878, 92 L.Ed.2d

199 (1986). In Allen, the Court held that Batson is not to be applied retroactively on collateral review of convictions which have become "final" prior to the announcement of the Batson decision. The Court defined "final" as meaning "'where the judgment of conviction was rendered, the availability of appeal exhausted, and the time for petition for certiorari had elapsed before our decision in' Batson." Allen, 478 U.S. at ___ n. 1, 106 S.Ct. at 2880, n. 1. Clearly, Jones' conviction became final prior to the court's announcement of Batson. Any reliance on Batson is, therefore, without merit. Instead, Jones' claim must be reviewed under the standard articulated in Swain.[5]

[2] Swain established that the "presumption in any particular case must be that the prosecutor is using the

State's challenges to obtain a fair and impartial jury to try the case before the court." 380 U.S. at 222, 85 S.Ct. at 837. This presumption cannot be rebutted by the allegation that in the particular case at hand the prosecutor struck all the blacks on the venire or even that he struck all the blacks on a venire because they were black. Rather, the presumption in favor of the prosecutor may be rebutted, according to Swain, by showing a systematic striking of blacks from the jury venire in "case after case, whatever the circumstances, whatever the crime and whoever the defendant or the victim may be." 380 U.S. at 223, 85 S.Ct. at 837. Such a showing, the Swain Court reasoned, could be sufficient to establish a "prima facie case" that the prosecutor was using the peremptory system "to deny the Negro the same right and opportunity to

participate in the administration of justice enjoyed by the white population," id at 224, 85 S.Ct. at 838, in violation of the Fourteenth Amendment.

In Willis v. Zant, 720 F.2d 1212, 1220 (11th Cir. 1983), we set forth the method by which a petitioner may make out a prima facie case under the Swain standard and thus overcome the presumption that the prosecutor acted within the confines of the Fourteenth Amendment equal protection clause.

> At his evidentiary hearing, petitioner must prove on specific facts [18] that [the prosecutor] had a systematic and intentional practice of excluding blacks from traverse juries in criminal trials through the exercise of peremptory challenges, and that this practice continued unabated in petitioner's trial. The exclusion must have occurred 'in case after case, whatever the circumstances, whatever the crime and whoever the defendant may be.' Swain, 380 U.S. at 223 [85 S.Ct. at 837].

> Petitioner is not required to show that the prosecutor always struck every black venireman offered to him, [United States v. Pearson, 448 F.2d 1207, 1217 (5th Cir. 1971)], but the facts must manifestly show an intent on the part of the prosecutor to disenfranchise blacks from traverse juries in criminal trials in his circuit, "to deny the Negro the same right and opportunity to participate in the administration of justice, enjoyed by the white population." Swain, 380 U.S. at 224 [85 S.Ct. at 838]. The prosecutor's use of peremptory challenges in only a few trials is clearly insufficient to state a prima facie case [footnote omitted], as would be a pattern of exclusion which occurred for only a few weeks. In short, petitioner must marshal enough historical proof to overcome the presumption of propriety in which Swain clothes peremptory challenges, and thereby show [the prosecutor's] intent to discriminate invidiously.

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[18]This proof could be direct evidence such as testimony, or indirect evidence such as statistical proof. Mere allegations are insufficient. (citations omitted).

720 F.2d at 1220 (emphasis in original).

[3] We believe that Jones has met this initial burden. At his evidentiary hearing in state court, Jones presented the testimony of six criminal attorneys practicing in Mobile whose experience spanned two and one-half years to fourteen years. All of them testified to having observed a pattern and practice on the part of the district attorney's office to use their peremptory challenges systematically to strike blacks from the jury venire. In support of their observations of the practice or pattern, almost all of them testified about specific cases in which they had observed the prosecutor systematically using his peremptory challenges to eliminate black venirepersons, often even before the prosecutor had questioned them. Each of the attorneys testified that the

behavior by the prosecutor had been so obvious to them that they had all made their objections a part of the record in some of the cases they had tried.

Robert Clark, who had practiced law in Mobile for fourteen years, recalled many specific examples of the prosecutor striking black jurors, some of which had prompted him to object. Clark also testified to having noticed a pervasive pattern of exclusion of blacks by the prosecutor's office:

> Defense Attorney: [What pattern have you noticed?
>
> Clark: A systematic exclusion of blacks not only in where black males are defendants but a systematic exclusion of blacks from jury service. They use their peremptory challenges for the systematic exclusion of blacks.
>
> Defense Attorney: Just from any criminal trial?
>
> Clark: Yes, sir.

Clark testified that his observations were confirmed by a consensus of the members of in the Mobile criminal defense bar. Clark recalled the names of five specific cases in which he raised objections to the fact that peremptory challenges were used by the prosecutor "to exclude blacks totally from at least five venires." In addition, Clark recalled a sixth case he had tried against McGregor, the same prosecutor as in this case, in which McGregor had used all his peremptories to strike blacks from the venire.

Jeff Deen, an attorney who had practiced in Mobile for six years, and participated in about 150 cases, also testified to observation of this pattern. Deen testified that this observation had prompted him not only to object, but recently to begin a

statistical study of all the cases he tried. He had, at the time he testified, completed statistical studies of two cases and in those cases the prosecutor had used all his peremptories to strike blacks on the venire, some of whom the prosecutor had not even questioned. Perhaps even more significantly, Deen had worked as an attorney in the district attorney's office and he testified that in the course of his employment there one of the lawyers in the office told him, "You're a fool to leave a young black male on a jury."

Lee Stamp had practiced in Mobile for two and one-half years and stated that he had been familiar with about twenty-four cases in that period. He testified to having observed a pattern, whereby this prosecutor's office would first strike all blacks and then any

Asian or Hispanic person. He could testify with full recall about three specific cases in which the prosecutor used his peremptories to strike all blacks from the venire. Stamp testified that he had objected to this practice several times.

Roosevelt Simmons, a Mobile attorney of two and one-half years, with knowledge of about twenty-five cases, testified to this pattern, testified to having objected to it at least five or six times, and testified that as a member of the Bay Area Bar Association (an association of black attorneys) he was participating in a project designed "to observe and research the practice of the District Attorney's office in excluding blacks from the jury."

Major Madision, an attorney with over two years experience testified to having observed this pattern, in his own

practice (four or five criminal trials in the last two years), and to having discussed it with many other members of the local bar who had also observed the pattern. Madison mentioned specifically his last trial in which the prosecutor was McGregor. McGregor had used his peremptories to strike all but one black person from the venire.

Steve Orso, also with about two and one-half years experience, testified that he had, in the course of thirty to forty-five trials, noticed a prosecutorial pattern of striking all blacks from the venire, that he began objecting to this practice, and that thereafter he observed that in the last three or four cases he tried the prosecutor struck all but one of the blacks on the venire.

The state adduced no evidence to cast doubt upon the existence of such a

pattern.[6] In fact, the prosecutor's testimony raised at least an inference that the jurors in this case were struck on the basis of race.[7] Jones' attorney offered twice to present more testimony of the kind described about but the trial judge discouraged him by stating, "[d]on't you think we've had enough," and by suggesting that further evidence would be cumulative.

Although a stronger case could have been established by researching the court records to prove statistically the observations of the six witnesses, statistical evidence is not necessary. Willis v. Zant, 720 F.2d at 1220 n. 18. Moreover, the state's evidence virtually made no challenge to the existence of such a pattern. In light of the substantial evidence adduced by Jones at the state evidentiary hearing, in light of the restriction upon his presentation

of additional evidence, and in light of the prosecutor's apparent belief that he need not adduce rebuttal evidence, we remand this case to the district court for an evidentiary hearing to be conducted pursuant to the guidelines established in Willis v. Zant, supra.

REVERSED AND REMANDED.

[Footnotes begin on next page.]

[1]Ala. Code §13A-5-9 (1982).

[2]In his habeas complaint Jones also attacked the sufficiency of the evidence. The district court also rejected this ground for relief. This issue is not before us on appeal.

[3]See e.g., Ashby, Juror Selection and the Sixth Amendment Right to an Impartial Jury, 11 Creighton L.Rev. 1137, 1161 (1978); Brown, McGuire & Winters, The Peremptory Challenge as a Manipulative Device in Criminal Trials: Traditional Use or Abuse, 14 New. Eng.L.Rev. 192 (1978) (advocating abolition of peremptories for prosecution absent other steps to prevent abusive exclusion of minorities from juries); Kuhn, Jury Discrimination: The Next Phase, 41 S.Cal.L.Rev. 235, 289 (1968); Massaro, Peremptories or Peers: -- Rethinking Sixth Amendment Doctrines, Images and Procedures, 64 N.C.L.Rev. 501 (1986) (rejecting equal protection analysis and advocating use of Sixth Amendment); Note, The Jury: A Reflection of the Prejudices of the Community, 20 Hastings L.J. 1417 (1969); Comment, Swain v. Alabama: A Constitutional Blueprint for the Perpetuation of the All-White Jury, 52 Va.L.Rev. 1157 (1966); Note, Peremptory Challenge -- Systematic Exclusion of Prospective Jurors on the Basis of Race, 39 Miss.L.J. 157, 159-60 (1967); Note, Limiting the Peremptory Challenge: Representation of Groups on Petit Juries, 86 Yale

L.J. 1715 (1977); Note, Fair Jury Selection Procedures, 75 Yale L.J. 322 (1965); Recent Development, Racial Discrimination in Jury Selection -- Limiting the Prosecutor's Right of Peremptory Challenge to Prevent a Systematic Exclusion of Blacks from Criminal Trial Juries, 41 Alb.L.Rev. 623 (1977) (advocating use of Sixth Amendment analysis to require government either to show that peremptory was not exercised because of defendant's race or to articulate a nonracial reason for exercise of peremptory challenge of black venirepersons).

[4]The Alabama Supreme Court denied Jones' petition for a writ of certiorari on October 19, 1984. Jones then had ninety days to file for certiorari with the Supreme Court. U.S. S.Ct. Rule 10, 28 U.S.C.

[5]In Lindsey v. Smith, 820 F.2d 1137(11th Cir. 1987), this court held that a defendant cannot escape the preclusive effect of Allen v. Hardy, supra, merely by substituting a Sixth Amendment label on the claim. Lindsey precludes any application in this case of a Sixth Amendment analysis freed from the restraints of Swain. But see Booker v. Jabe, 775 F.2d 762 (6th Cir. 1985), vacated, ___ U.S. ___, 106 S.Ct. 3289, 92 L.Ed.2d 705 reinstated on remand, 801 F.2d 871 (6th Cir. 1986), cert. denied, ___ U.S. ___, 107 S.Ct. 910, 93 L.Ed.2d 860

(1987); McCray v. Abrams, 750 F.2d 1113 (2d Cir. 1984), vacated, ___ U.S. ___, 106 S.Ct. 3289, 92 L.Ed.2d 705 (1986); United States v. Hardiman, 656 F.Supp. 1006 (N.D.Ill. 1987).

[6]The district attorney's cross-examination of each witness focused essentially on two points; first, that each witness had only observed a specific number of cases; and, second, that no witness could "state under oath unequivocably that in every case [the witness had] tried or observed the District Attorney's office has used all of its peremptory challenges against blacks." Neither of these two points is sufficient under Willis. "Petitioner is not required to show that the prosecutor always struck every black venireman offered to him.... The prosecutor's use of peremptory challenges in only a few trials is clearly insufficient to state a prima facie case, (footnote omitted) as would be a pattern of exclusion which occurred for only a few weeks." 720 F.2d at 1220. Here, Jones' case suffers from neither of those deficiencies. None of his witnesses had practiced less than two and one-half years and two had practiced much longer. The total number of cases the witnesses had collectively observed was substantial. Each witness stated that all or almost all blacks were struck from the venire panel in every case they recalled.

The state presented no witnesses of its own except for McGregor, the assistant district attorney who had prosecuted Jones and who had been with the district attorney's office only four or five months. McGregor's testimony was

a conclusory statement that he was unaware of any policy to systematically strike blacks. In addition, he testified that in ten of the twelve cases he had tried he had "not used my strikes to strike all blacks off the jury." Thus, he conceded that he did strike all blacks off the jury in two of his cases. Moreover, McGregor's testimony as a whole leaves a strong impression that he struck most blacks in the other cases. Other witnesses' testimony indicated that McGregor often struck all the blacks but one.

[7]After listing several reasons why he might typically strike a black juror -- e.g., not gainfully employed or not a family man--the prosecutor, McGregor, was asked whether the seven blacks he struck from the jury completed Jones trial fit those categories. McGregor acknowledged they may not have, stating that he struck those seven jurors because he did not like their looks. Under these circumstances, McGregor's stated reason for striking the jurors in this case entails a reasonable inference that they were struck on the basis of race. Although McGregor also testified in conclusory fashion that he was unaware of any policy to systematically strike blacks, Willis holds that such conclusory testimony is insufficient.

APPENDIX B

Reginald Jones, Petitioner,

v.

J. O. Davis, Respondent.

C. A. No. 85-0838-X-C

United States District Court,

S.D. Alabama, S.D.

March 6, 1986

O R D E R

This cause comes before the Court on the issue of whether to issue a certificate of probable cause and grant leave to appeal in forma pauperis. No appeal of final judgments under 28 U.S.C. §2254 may proceed without a certificate of probable cause. 28 U.S.C. §2253. In this instance the motion for said certificate is due to be denied.

In order for a court to issue a certificate of probable cause, the

habeas petitioner must "make a 'substantial showing of the denial of [a] federal right.'" Barefoot v. Estelle, ___ U.S. ___, 103 S.Ct. 3383, 77 L.Ed.2d 1090, 1104 (1983). The Barefoot court cited with approval the following language defining "substantial showing":

> In requiring a "question of some substance," or a "substantial showing of the denial of [a] federal right," obviously the petitioner need not show that he should prevail on the merits.... Rather, he must demonstrate that the issues are debatable among jurists of reason; that a court could resolve the issues [in a different manner]; or that the questions are "adequate to deserve encouragement to proceed further."

Id. at n. 4 (citations omitted).

The petitioner has failed to make a substantial showing of the denial of a federal right. Pursuant to the discussion, infra, the Court concludes

that this is not the kind of case that ought to be encouraged to proceed further; nor does the Court believe that the facts raise issues that could be resolved differently by different courts.

The petitioner raises two claims. First, that members of the black minority were excluded by means of the prosecuting attorney using seven of his nine strikes to excuse all seven of the prospective black jurors. It is the opinion of this Court that the petitioner has failed to establish a systematic use of peremptory challenges to exclude members of the black minority race in jury trials conducted in Mobile County, Alabama. as required in Swain v. Alabama, 380 U.S. 202, 85 S.Ct. 824, 13 L.Ed.2d 759 (1965). See also Willis v. Zant, 720 F.2d 1212 (11th Cir. 1984), cert. denied, ___ U.S. ___, 104 S.Ct. 3548, 82 L.Ed.2d 851 (1984). The state

court held that petitioner had failed to prove the systematic use of peremptory challenges to exclude black persons from jury service. Therefore, pursuant to 28 U.S.C. §2254(d) no valid federal claim is raised. Secondly, the petitioner asserts that the evidence produced against him at trial was insufficient to sustain a verdict of guilty. The recommendation of the magistrate. which was adopted as the opinion of this Court per Order dated February 13, 1986, stated that the evidence presented at trial was sufficient to sustain a guilty verdict. See Jackson v. Virginia, 443 U.S. 307 (1979). There are thus no federal claims presented. Accordingly, the

The Court also finds that the appeal of this case is frivolous. Therefore, pursuant to 28 U.S.C.

§1915(d), the motion to appeal *in forma pauperis* is DENIED.

IT IS DO ORDERED.

DONE this 6th day of March, 1986.

/s/ W. B. Hand
Chief Judge

APPENDIX C

Reginald Jones, Petitioner,

v.

J. O. Davis, Respondent.

C. A. No. 85-0838-X

United States District Court,

S.D. Alabama, S.D.

February 13, 1986

O R D E R

Upon consideration of the Recommendation of the Magistrate entered January 17, 1986, as well as all other filings in this action, including the objections filed by the petitioner on January 30, 1986, said Recommendation is adopted as the opinion of the Court. It is ORDERED that the relief requested in this matter, a petition for writ of habeas corpus, be and is hereby DENIED on the merits.

DONE this 13th day of February, 1986.

/s/ W. B. Hand
Chief Judge

APPENDIX D

Reginald Jones, Petitioner,

v.

J. O. Davis, Respondent.

C. A. No. 85-0838-X-C

United States District Court,

S.D. Alabama, S.D.

January 17, 1986

RECOMMENDATION OF MAGISTRATE

This cause is one for habeas corpus relief pursuant to 28 U.S.C. §2254. The petition has been referred to the Magistrate for his recommendation pursuant to 28 U.S.C. §636(b)(1)(B). Two issues are raised by petitioner, namely:

> 1. Members of the black minority were excluded by means of the prosecuting attorney using seven of his nine strikes to excuse all seven of the prospective black jurors; and

2. I was convicted of burglary without sufficient evidence to support the verdict.

A. Exhaustion.

Respondent has stated in his pleadings that petitioner has exhausted his State remedies as to the two grounds upon which he seeks relief.

B. Merits.

1. Discriminatory Striking Under Swain.

The jury was selected in this case on January 23, 1984, and during that selection the Assistant District Attorney of Mobile County, Alabama used seven of his nine peremptory strikes to strike all of the members of the black minority race from the jury venire. Petitioner, a young black male, was then tried before an all white jury. (Tr. 103). Petitioner's attorney objected to

the striking at the trial stage and requested an evidentiary hearing in order to rebut the presumption in any case that the prosecutor is using the State's challenges to obtain a fair and impartial jury to try the case before the Court. Swain v. Alabama, 380 U.S. 202, 222, 85 S.Ct. 824, 837, 13 L.Ed.2d 759 (1965). This hearing was held after trial at which time petitioner brought before the Court six different criminal defense attorneys who testified under oath as to their observation of what they considered a pattern of discriminatory striking engaged in by the Mobile County District Attorney's Office. (Tr. 102 et seq.)

I have read the entire transcript in this cause and find that petitioner has failed to make a showing of substantial evidence that would rebut the presumption that the prosecutor was

using his strikes in this case to obtain a fair and impartial jury. Petitioner has not established in his petition for habeas corpus relief or at the evidentiary hearing in the trial Court a systematic use of peremptory challenges to exclude members of the black minority race in jury trials conducted in Mobile County, Alabama. The test enunciated in Swain is as follows:

> . . .[W]hen the prosecutor in a county, in case after case, whatever the circumstances, whatever the crime and whoever the defendant or victim may be, is responsible for removal of Negroes who have been selected as qualified jurors by the jury commissioners and who have survived challenges for cause, with the result that no Negroes ever serve on any juries, the Fourteenth Amendment claim takes an added significance. (Citation omitted). In these circumstances, given even the widest leeway to the operation of irrational but trial related suspicions and antagonisms, it would appear

> that the purposes of the peremptory challenge are being perverted. If the state has not seen fit to leave a single Negro on any jury in a criminal case, the presumption protecting the prosecutor may well be overcome. Such proof might support a reasonable inference that Negroes are excluded from juries for reasons wholly unrelated to the outcome of the particular case on trial and that the peremptory system is being used to deny the Negro of the same right and opportunity to participate in the administration of justice enjoyed by the white population. These ends the peremptory challenge is not designed to facilitate or justify.

Swain v. Alabama, 380 U.S. at 202-204. Petitioner is required not to show that the prosecutor always struck every black venireman, but must manifestly show an intent to disenfranchise blacks in criminal trials in this circuit. His striking of all the blacks in a few trials is clearly insufficient to state a prima facie case. Petitioner must

present to the Court enough historical proof to overcome the presumption as stated in Swain. Willis v. Zant, 720 F.2d 1212 (11th Cir. 1984), cert. denied, ___ U.S. ___, 104 S.Ct. 3548, 82 L.Ed.2d 851 (1984). This claim by petitioner is due to be dismissed.

2. Insufficient Evidence to Establish Guilt.

Petitioner also asserts that the evidence produced against him at trial was insufficient to sustain a verdict of guilty. The test in reviewing such claim is stated as follows:

> Whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.

Jackson v. Virginia, 443 U.S. 307, 319 (1979).

Petitioner was charged with burglary in the third degree under

Section 13A-7-7, Code of Alabama 1975, as amended.

> Section 13A-7-7. Burglary in the Third Degree.
>
> (a) A person commits the crime of burglary in the third degree if he knowingly enters or remains unlawfully in a building with intent to commit a crime therein.

The indictment charging petitioner stated that he did knowingly enter or remain unlawfully in a building, the property of Zenia Taylor, with the intent to commit a crime therein, to-wit: theft, in violation of §13A-7-7. The crime of theft in Alabama is defined as follows:

> §13A-8-2. Theft of Property -- Definition.
>
> A person commits the crime of theft of property if he:
>
> (1) knowingly obtains or exerts unauthorized control over the property of another, with intent to deprive the owner of the property; or

(2) knowingly obtains by deception control over the property of another, with intent to deprive the owner of his property.

The State produced as witnesses Zenia Taylor, Charles Greer and Goldie Greer to establish the fact that Mrs. Taylor's home in Prichard, Alabama was broken into on or about July 25, 1983. Mrs. Taylor identified two items as missing from her home subsequent to the break in: an electric clock and a big mirror. (Tr. 19). At Mrs. Taylor's back door, they found two of her pillow cases full of dishes from her china closet, bric-a-brac, antiques, and other things.

Mr. Greer, who remained at the dwelling after discovering that the house had been broken into, identified the defendant as having come by the house while he was there, approach the house, and requested that he be allowed

to pick a pear from Mrs. Taylor's pear tree.

The State then introduced evidence that the defendant's fingerprints were found on those items found in the two pillow cases located at the back door of Mrs. Taylor dwelling. Mr. Willie E. Barrow, identification officer, for the Police Department, City of Prichard, Alabama, testified that in his opinion as a fingerprinting expert, the latent prints lifted from the glass items in those pillow cases were identical to the defendant's fingerprints taken after arrest.

Petitioner's appearance at Mrs. Taylor's home soon after the burglary was discovered, coupled with the positive fingerprint identification as to the items taken from the house but dropped at the back door, establishes, in my opinion, the essential elements of

the charged crime. Accordingly, the claim as to the sufficiency of the evidence against the petitioner should be denied.

C. Conclusion.

It is my recommendation that the petition for habeas corpus in this cause be denied pursuant to Rule 8 of the Rules Governing Section 2254 Cases.

The attached sheet contains important information regarding objections to this recommendation.

DONE this the 17th day of January, 1986.

/s/William E. Cassady
WILLIAM E. CASSADY
UNITED STATES
MAGISTRATE